Supreme Court, U.S.
FILED
MAR 24 1995
OFFICE OF THE CLERK

No. 94-859

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al.*,
Petitioners,
v.
SWEET HOME CHAPTER OF COMMUNITIES FOR A GREAT OREGON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA; THE FOUNDATION FOR ENVIRONMENTAL AND ECONOMIC PROGRESS, INC.; THE COUNTY OF KERN, CALIFORNIA; THE KERN COUNTY WATER AGENCY; THE NATIONAL ASSOCIATION OF REALTORS®; THE OREGON ASSOCIATION OF REALTORS®; AND THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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The Organizations listed above respectfully file this brief as *amici curiae* in support of Respondents. Written consent has been obtained from counsel for petitioners and respondents for the filing of this brief pursuant to Supreme Court Rule 37. The letters reflecting consent have been filed with the clerk's office.

INTEREST OF *AMICI CURIAE*

Amici represent a broad cross section of public and private interests that have been adversely affected by the regulatory overreach of the U.S. Fish and Wildlife Service ("FWS") under the Endangered Species Act ("ESA" or the "Act"). The Chamber of Commerce of the United States of America ("Chamber") is the largest federation of business, trade, and professional organizations in the United States. The Chamber represents more than 215,000 companies, as well as several thousand trade and professional organizations, and state and local chambers of commerce. Ninety-six percent of the Chamber's members are businesses with fewer than 100 employees; seventy-one percent of the Chamber's members have fewer than ten employees. A significant aspect of the Chamber's activities involves the representation of the interests of its members in property rights and land use matters before the courts, the U.S. Congress, the executive branch, and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to protect those interests by participating in a variety of environmental and natural resource litigation efforts.

The Foundation for Environmental and Economic Progress, Inc. is a coalition of landowners that was founded to address federal environmental and economic policies affecting the use of land. The Foundation presently represents fourteen large entrepreneurial landowners and community developers with property in forty-four states. The ESA significantly affects Foundation members' use of their land.

The County of Kern is a political subdivision of the State of California. The Kern County Water Agency is also a political subdivison of the State of California, created for the purpose, *inter alia*, of providing water for the residents and lands throughout the County. The Agency supplies water to municipal and industrial consumers, as well as to over 300,000 acres of irrigable land, and maintains a variety of systems for storing and

delivering water to its customers. The Agency and the County's activities have been significantly affected by prohibitions on habitat modification under the ESA.

The National Association of Realtors® ("NAR") is a not-for-profit professional association comprised of approximately 750,000 persons engaged in all phases of the real estate business. NAR was created in 1908 to, *inter alia*, promote and encourage the highest and best use of land and protect and promote private ownership of real property. NAR includes among its members real estate brokers, managers, appraisers, counselors, and a variety of other participants in the residential, commercial, industrial, farm, and investment real estate markets. NAR members suffer adverse impacts when ESA prohibitions delay or otherwise affect development projects. The Oregon Association of Realtors® is a state affiliate of NAR. Its members have been particularly affected by federal land use controls arising out of the ESA.

The National Association of Industrial and Office Properties ("NAIOP") is a professional organization of 5,000 individuals engaged in owning, managing, and developing industrial and office buildings in the United States and internationally. Its members include not only the nation's leading commercial real estate developers, but also architects, brokers, master planners, engineers, property managers, banks, insurance companies, and other real estate financial groups. Development of industrial and office properties may be affected by regulation of habitat modification under the ESA.

Amici file this brief because of the broad impact the FWS regulation has had on a wide range of activities undertaken by individuals, businesses, and units of local government. *Amici* and their members have experienced and are aware of numerous situations in which the activities of nonfederal parties have been substantially affected by the prohibitions on land use arising from FWS's "harm" regulation.

The experience of a landowner in Texas is typical. Mrs. Margaret Rodgers of Lago Vista, Texas received a letter from FWS in 1991 informing her that clearing of vegetation on property of which she was part owner was destroying "prime habitat for the federally-listed endangered golden-cheeked warbler." The letter stated that destruction of habitat may constitute a take, which "could expose a violator to the criminal penalties provided for" under the Act. The letter also stated that the matter was being investigated by a Special Agent, suggesting that Mrs. Rodgers might be the subject of a criminal prosecution for clearing some vegetation. Little imagination is needed to envision the chilling effect of such a letter on ordinary activities that might affect habitat regardless of the presence of any golden-cheeked warblers.

The Kern County Water Agency had a similar experience. The Agency and the California Department of Water Resources ("DWR") proposed construction of a joint water project, called the "Kern Water Bank," on a 20,000-acre area southwest of Bakersfield, California. The proposal called for the conversion of 17,000 acres of agricultural land to a multi-use facility for groundwater overdraft correction, underground water storage for drought protection, community recreational use, and wildlife habitat.

After the agricultural land was fallowed to conserve water, which had the unintended effect of making the land suitable habitat for the blunt-nosed leopard lizard and the Tipton kangaroo rat, FWS, acting with and through the California Department of Fish and Game, began to demand dedication of thousands of acres for the protected species. The agencies asserted that modification of the newly fallowed land was a criminally prohibited "take" under the ESA. Negotiation of a Habitat Conservation Plan ("HCP") for the species began in 1991, and the most recent demands of the wildlife agencies are for the set-aside of three acres of habitat for every acre used by the project. DWR is now selling the project to the Kern County Water Agency, which is

reevaluating the project to determine if it continues to be economically feasible after more than three years of protracted and expensive negotiations.[1]

The Kern County Water Agency experienced further ESA-induced hardship when, in 1991, the Agency was confronted with the most serious emergency of its three decades of existence. Of the Agency's 1,154,000 acre-feet of agricultural waters entitlement from the California State Water Project, the Agency received zero acre-feet, *i.e.*, no water. Without water, over 100,000 acres of permanent crops, consisting of orchards and vineyards, were at risk of destruction. Annual crops planned for hundreds of thousands of acres of land were also threatened due to the drought. Destruction of the annual crops would terminate an income stream having a present value of billions of dollars. To avoid these results, the Agency's plan was to refurbish existing water wells and drill new water wells to extract water banked in the underground basin. However, the endangered blunt-nosed leopard lizard was discovered in the vicinity of the Agency's wells. The Department of Fish and Game informed DWR officials that the proposed refurbishing and drilling activities would disturb the ground around the well areas and, as such, could result in a "taking" of an endangered species under the ESA. Fearing criminal prosecution, the DWR delayed the project so that trapping of the lizard

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[1] The Water Agency's difficulty in negotiating an acceptable HCP, which is a prerequisite to obtaining an "incidental take" permit for otherwise lawful activities, demonstrates that the ESA's "escape valve" for property owners affected by Section 9 prohibitions is wholly inadequate. A recent study reported that up to three years is needed to develop and gain the FWS's approval of an HCP. U.S. General Accounting Office, GAO/RCED-95-16, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* 9 (Dec. 1994). The experience of *amici* has been that this process can last longer than three years, with only a small likelihood that the process will actually yield a permit. The result is that for all but the most tenacious, the ESA makes it well nigh impossible for landowners to realize beneficial use of their land.

could determine its habitat. Fear of prosecution for perfectly reasonable behavior resulted in thousands of acre-feet of waters unpumped and thousands of acres of crops destroyed.

These examples show that the FWS interpretation being challenged has affected both public projects and private land use. Out of fear that they may be criminally prosecuted, public agencies and private property owners have been forced to forgo or delay projects at considerable expense, while untold acres have been effectively taken by the federal government through the land use authority FWS has assumed by virtue of its "harm" regulation.

STATEMENT OF THE CASE

Amici adopt the statement of the case contained in the Brief for Respondents.

SUMMARY OF ARGUMENT

This case concerns the validity of a federal regulation that has subjected a multitude of private and state and local government land use activities—from grading land to mowing grass—to federal control and exposed those engaging in such activities to potential criminal liability. Section 9 of the Endangered Species Act of 1973 makes it unlawful for any person to "take" endangered species of fish or wildlife. While "take" is defined in the statute to include "harm," the word "harm" is not defined in the ESA. Pursuant to the Act, FWS promulgated a regulation that defines "harm" in a manner that prohibits habitat modification by nonfederal actors, thereby making habitat modification a potentially criminal act. The question before this Court is whether the FWS regulation is consistent with Congress' intent in enacting Section 9.

In reviewing an agency interpretation of a statutory provision, the Court must give effect to Congress' intent when that intent is clearly expressed. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). There is no ambiguity in the

ESA; the language and structure of the Act establish that Congress intended to place the burdens associated with habitat protection only on federal actors. Thus, the FWS rule expanding "take" to prohibit habitat modification by private parties and other nonfederal entities is inconsistent with the clearly expressed intent of Congress and must be rejected.

Even if the Court were to determine that Congress did not express its intent on this issue, the rules of statutory construction appropriate to this case would lead to the same result. The regulation at issue expands potential criminal liability by making habitat modification a prohibited act. But administrative agencies, which enforce the laws, may not also make those laws. That way lies tyranny. Instead, under the separation of powers principles embodied in our Constitution, Congress, not the agencies or the courts, defines what behavior will be subject to criminal sanctions.

Moreover, FWS's rule criminalizes ordinary conduct (*e.g.*, mowing the lawn) without providing notice to citizens that such conduct may be deemed criminal. Due process demands more: crimes must be defined clearly. Where Congress' intention is not clear, this Court has employed the rule of lenity to construe ambiguous statutory provisions to limit potential criminal liability and avoid due process concerns. Thus, the agency's claims to deference must be rejected and the FWS regulation invalidated. This Court should not allow citizens to be "deferred" into prison.

ARGUMENT

I. THE LANGUAGE AND STRUCTURE OF THE ESA MAKE CLEAR THAT CONGRESS DID NOT INTEND FOR "TAKE" TO INCLUDE THE CONCEPT OF HABITAT MODIFICATION.

The question presented in this case is one of statutory interpretation. In such cases, the traditional tools of statutory construction—language, structure, and legislative history—are used to determine the meaning of the statute. *Crandon v. United States,* 494 U.S. 152, 158 (1990); *INS v. Cardoza-Fonseca,* 480 U.S. 421, 432 n.12 (1987). If the intent of Congress is clearly expressed, then a reviewing court must give effect to that intent. *Chevron,* 467 U.S. at 843 n.9.

As demonstrated below, the intent of Congress in using the words "take" and "harm" in the ESA is clear. The language and structure of the Act reflect an intent in Section 9 to proscribe traditional "takes"—intrusive acts targeted at specific individual members of protected species—and not to proscribe habitat modification, even where such modification may ultimately harm a species. Instead, habitat modification was addressed through Section 7, which regulates the conduct of federal actors (and through them, their licensees). The Court should give effect to Congress' intent by striking down FWS's regulatory definition of "harm" in 50 C.F.R. § 17.3 as inconsistent with the ESA.

A. The Language of the ESA Demonstrates That Habitat Modification Is Not a Prohibited Act Under Section 9.

" 'The starting point in every case involving construction of a statute is the language itself.' " *Landreth Timber Co. v. Landreth,* 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975) (Powell, J., concurring)). In enacting the ESA in 1973, Congress created a conservation program for endangered and threatened species of flora and

fauna and their habitats. *See* 16 U.S.C. §§ 1531-1544 (1994). The principal features of that conservation program as it relates to domestic species are found in three sections of the Act. Sections 5 and 7 are directed to federal agencies. Section 5 authorizes FWS to acquire habitat for endangered and threatened species. 16 U.S.C. § 1534. Section 7 requires federal agencies to exercise their authorities to promote the conservation of listed species and to ensure that their actions are not likely to jeopardize the continued existence of such species or to modify designated habitat. 16 U.S.C. § 1536. Section 9, on the other hand, applies to all persons. It prohibits individuals from engaging in a variety of activities, including trade in protected species. 16 U.S.C. § 1538. Section 9 also prohibits another class of acts pertaining to fish and wildlife species, which Congress summed up in the word 'take." 16 U.S.C. § 1538(a)(1)(B)-(C). In choosing that word, Congress invoked a venerable linguistic tradition.

For centuries, "take" had been used in English and American jurisprudence and common parlance to describe human efforts to subdue wild animals. The earliest references to the "taking" of wild creatures demonstrate, via context, that the word "take" signified direct, intrusive human activities targeted at particular animals that resulted in reducing those animals to possession. An English translation of the Justinian Code stated, " '[A]ll the animals which can be taken upon the earth, in the sea, or in the air,—that is to say, wild animals,—belong to those who take them, . . . because that which belongs to nobody is acquired by the natural law by the person who first possesses it.' " [2] Similarly, in his commentary on property, Blackstone wrote, "[B]y the law of nature every man, from the prince to the peasant, has an equal

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[2] *Geer v. Connecticut*, 161 U.S. 519, 523 (1896) (quoting *Digest of Justinian*, Dig. bk. 41, tit. 1, De Adquir. Rer. Dom.), *overruled in part by Hughes v. Oklahoma*, 441 U.S. 322 (1979).

right of pursuing, and taking to his own use, all such creatures as are *ferae naturae*." [3]

This understanding of "take" as meaning human activities directed at particular members of a species resulting in possession was incorporated into numerous early state fish and wildlife statutes. Those statutes augmented the word's meaning by associating the term "take" with a multitude of other terms related to hunting and fishing activities.[4] By the time the word passed into contemporary usage, many of the hunting and fishing terms had, in the context of fish and wildlife activities, become synonymous with "take." [5] It was natural, there-

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[3] 2 William Blackstone, *Commentaries* *411.

[4] *See, e.g.*, 1833 Md. Laws ch. 254, § 1 (prohibiting taking or catching of oysters " 'with a scoop or drag, or any other instrument than such tongs and rakes as are now in use' ") (*quoted in Smith v. Maryland*, 59 U.S. (18 How.) 71, 73 (1855)); 1886 Mass. Acts ch. 192, § 1 (prohibiting drawing, setting, stretching, or using of any drag net, set net or gill net, purse or sweep seine of any kind, for taking fish); 1920 La. Acts No. 135 (prohibiting taking of fur-bearing animals and alligators except during open season); 1923 Wash. Laws ch. 90, § 4 (prohibiting fishing or taking for sale or profit any salmon or other food or shellfish; defining "fishing" as "catching or taking of food fish with any appliance, gear or trap, floating or fixed, whatsoever"); 1926 La. Acts No. 103, §§ 4, 5, 13 (regulating taking and reduction to private ownership of shrimp); 1945 Cal. Stat. ch. 181 (persons who use, operate, or assist in using or operating any boat, net, trap, line, or other appliance to take fish, mollusks, or crustaceans for profit must procure a commercial fishing license); 1947 Mont. Laws ch. 224, § 5 ("No game birds or game or fur-bearing animals shall be killed, taken or hunted from an aeroplane, nor shall any aeroplane be used for the purpose of concentrating, pursuing, driving, rallying or stirring up any game or migratory birds, game or fur-bearing animals."); *see also Geer*, 161 U.S. at 527 ("The practice of the government of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game.").

[5] As commonly defined today, "take" means "to get possession (as fish or game) by killing or capturing," *Webster's Third New International Dictionary* 2330 (Merriam 1981), or "[t]o get into one's possession by force, skill, or artifice, esp.: . . .[t]o kill, snare,

fore, for Congress to reach for the word "take" when wildlife conservation began to emerge as an issue of national concern and Congress was called on to craft protective legislation. Indeed, in its earliest effort to articulate its own set of prohibitions with respect to fish and wildlife—the Migratory Bird Treaty Act of 1918 ("MBTA")—Congress chose to prohibit activities that would "take" or "attempt to take" species. *See* 16 U.S.C. § 703 (1994).

When Congress enacts a law, its familiarity with the common meaning of the words it uses is presumed. *See Perrin v. United States,* 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning."). Similarly, it is presumed that Congress is knowledgeable about existing law pertinent to the legislation it enacts. *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Therefore, as it began to fashion legislation to protect wild animals, Congress was undoubtedly aware of the ordinary meaning of "take" and its long-established use in state fish and wildlife statutes (*i.e.*, as "hunt," "fish," "capture," "kill," or other terms that convey the notion of intrusive human activity directed at particular members of fish or wildlife species and resulting in possession).[6]

Thus, in the MBTA, Congress made it unlawful for any person to "pursue, hunt, take, capture, kill, [or] attempt to take, capture, or kill" any migratory bird. 16 U.S.C. § 703. In using the term "take" as well as "attempt to take" in associaton with "pursue," "hunt," "capture," and "kill," Congress was using "take" in a manner consistent with its common meaning, *i.e.*, to

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or trap (fish or game, for example)." *American Heritage Dictionary* 1239 (2d ed. 1985).

[6] Given that Congress was moving into an area typically reserved to the states, *see, e.g.*, Michael J. Bean, *The Evolution of National Wildlife Law* 12-17 (rev. & exp. ed. 1983), congressional action would undoubtedly have been informed by state statutes reflecting the long state experience in this area.

describe an action that is direct, intrusive, and targeted at a particular animal or group of animals.[7]

In later statutes, Congress began to use the term "take" to cover the range of related activities it intended to prohibit, always defining the term in accordance with its original understanding of the core meaning of the word, *i.e.*, intrusive actions directed at particular animals that typically, although not necessarily, would result in possession. In the Bald and Golden Eagle Protection Act of 1940, Congress defined "take" as "pursue, shoot, shoot at, wound, kill, capture, trap, collect, or otherwise willfully molest or disturb." Pub. L. No. 76-567, § 4, 54 Stat. 251 (1940) (codified as amended at 16 U.S.C. § 668c (1994)). In the Fur Seal Act of 1966 and the Marine Mammal Protection Act of 1972, Congress defined "take" as "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill." 16 U.S.C. §§ 1151(m), 1362(13) (1994). In these statutes, Congress used a variety of different terms to define "take," adding words such as "molest," "disturb," and "harass" to more traditional forms of take, such as "kill," "hunt," and "capture." However, the concepts embodied in all of the terms

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[7] FWS has defined "take" for purposes of the MBTA in a manner that reflects this common notion of the term. *See* 50 C.F.R. § 10.13 (1994) (defining "take" as "pursue, hunt, shoot, wound, kill, trap, capture or collect," or attempts to engage in such conduct). This same understanding of "take" is also reflected in several international agreements to which the United States became signatory in the decades following enactment of the MBTA. *See, e.g.*, Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, Oct. 12, 1940, art. VIII, 56 Stat. 1354, 161 U.N.T.S. 193 (hunting, killing, capturing, or taking of species allowed only with permission of each country's government); International Convention for the Regulation of Whaling, Dec. 2, 1946, art. VIII, 62 Stat. 1716, 161 U.N.T.S. 72; Protocol to the International Whaling Convention, Nov. 19, 1956, art. I, 10 U.S.T. 952, 953 (regulating hunting, taking, killing, towing, holding on to, or scouting for whales by use of aircraft, helicopter, or ship); Agreement on the Conservation of Polar Bears, Nov. 15, 1973, art. I, 27 U.S.T. 3918, 3921 (defining "taking" as "hunting, killing, and capturing"). None of these treaties define "take" to include habitat modification.

chosen by Congress to define "take" in the fish and wildlife context were compatible with Congress' consistent use of the word over the course of fifty years; they all involve direct, intrusive interaction between a human and a specific animal.[8] Thus, while Congress added variations on a theme, it did not add wholly new and dissonant elements; rather, Congress consistently used the term "take" in a manner that accorded with its traditional and commonly understood meaning.

When Congress enacted the ESA in 1973, it again used the term "take" as the operative term to describe prohibited acts. In this case, Congress added another variant, "harm," to the "take" definition. Congress did not define "harm" or, indeed, any of the words that make up the ESA "take" definition. Certainly, in the absence of explicit congressional direction to the contrary, there is no evidence to suggest that Congress intended, through the addition of the word "harm," to depart completely from the core meaning of the word 'take" as Congress understood it. *See Dole v. United Steelworkers*, 494 U.S. 26, 36 (1990) (" '[W]ords grouped in a list should be given related meaning.' ") (citations omitted). In fact,

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[8] For instance, "harass" has been defined in the Marine Mammal Protection Act to involve this same core concept of direct, intrusive interaction directed at a particular animal or animals. *See United States v. Hayashi*, 22 F.3d 859, 864 (9th Cir. 1993) (to constitute a "take," "harassment" must entail direct intrusion that is similar in significance to killing, capturing, or hunting; the harassment must be a serious and sustained diversion of a marine mammal from its natural routine); *see also* 46 Fed. Reg. 29,490, 29,491 (1981) (Interior Department Office of the Solicitor opinion that "harass" represents a form of conduct that is "directed against and likely to injure or kill *individual* wildlife"). There is evidence that Congress understood the term in a similar vein in the ESA, as demonstrated by the committee statement that birdwatching could constitute harassment under certain circumstances. *See* H.R. Rep. No. 412, 93d Cong., 1st Sess. 11 (1973). Such an activity involves an intrusive interaction with a bird that would affect the bird in a very direct fashion. In normal usage, "molest" and "disturb" embody the same notion.

as discussed below, the evidence is very much to the contrary.[9]

Construing the word "harm" to mean "modify habitat," as the FWS has done, *see* 50 C.F.R. § 17.3, would result in just such a departure in the meaning of "take." Habitat modification is logically inconsistent with Congress' overarching choice of the word "take" as the focal point of Section 9 prohibited acts. Habitat modification activities such as cutting a tree or mowing a field are not targeted at individual members of fish or wildlife species. Nor do they, as a *necessary* component, involve direct, intrusive interactions with particular individuals. FWS's interpretation, however, sweeps broadly to include within the ambit of "take" a wide range of activities that would "harm" endangered animals only indirectly by, for instance, prompting an animal to feed in a different area. Such activities do not involve direct, intrusive interaction between a human and an animal. Thus, habitat modification differs in kind from all other activities previously defined as "take." It strains credulity to believe that Congress—knowing full well the common meaning of "take" —would have chosen the term "harm" to make a quantum leap in the traditional meaning of "take," particularly when "harm" can easily be read in a manner fully consistent with the accepted meaning of "take."

In the face of the long history of the term "take," the government makes much of a Senate committee report on

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[9] *See infra* Part I.B. The legislative history provides further evidence that Congress intended to exclude habitat modification from the definition of "take." Senate Bill No. 1983, which, as amended, ultimately became the ESA, originally specified "destruction, modification, or curtailment of habitat or range" as part of the definition of "take." *See* S. 1983, 93d Cong., 1st Sess. § 3(6)(A) (1973). This provision was deleted from the final act during committee markups. "Such deletions generally militate against a conclusion that Congress intended a result that it expressly declined to enact." 46 Fed. Reg. at 29,491 (citing *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974)) (Interior Department Office of the Solicitor memorandum opinion on the FWS's "harm" regulation).

an early version of the ESA that stated, " '[T]ake' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife." S. Rep. No. 307, 93d Cong., 1st Sess. 7 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2995; *see* Brief for Petitioners at 16, 27-28; Petition for Writ of Certiorari at 15-16. That statement is unremarkable, however. Congress clearly intended to incorporate many different types of efforts to subdue species into the ESA "take" definition. As illustrated by the pre-ESA fish and wildlife statutes, the "conceivable ways" of reducing members of a species to human possession are extremely diverse. They include not only such common actions as shooting a creature with a gun or an arrow or catching a fish with hook and line, but also such activities as netting, baiting, luring, clubbing, poaching, poisoning, spraying, raking, knifing, spearing, scooping, dragging, purse-seining, harpooning, rounding up, and harvesting.[10] But they do not include habitat modification.

FWS's inclusion of habitat modification in the definition of "harm," and thus in the definition of "take," would distort beyond recognition the latter word's long-established meaning. In light of the fact that Congress chose *not* to add the words "modify habitat" to the ESA definition, it is clear that Congress did not intend an expansive interpretation that is at such variance with contemporaneous understandings of the term "take."[11] *See Colautti v. Franklin*, 439 U.S. 379, 392 n.10 (1979) ("As a rule, '[a] definition which declares what a term "means" . . . ex-

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[10] *See, e.g., supra* notes 4, 7.

[11] The same Senate report that described Congress' use of the term "take" to include all "conceivable ways" an animal can be taken also stated that an "accelerated land acquisition program is essential" because "[o]ften, protection of habitat is the only means of protecting endangered animals which occur on non-public lands." S. Rep. No. 307 at 4, *reprinted in* 1973 U.S.C.C.A.N. at 2992. This confirms that the 1973 Congress perceived "take" and habitat destruction to address conceptually different problems.

cludes any meaning that is not stated.' ") (quoting 2A C. Dallas Sands, Statutes and Statutory Construction § 47.07 (4th ed. Supp. 1978).

B. The Structure of the ESA Demonstrates That Habitat Modification Is Not a Prohibited Act Under Section 9.

"In ascertaining the plain meaning of [a] statute, [a] court must look to . . . the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). The structure of the ESA provides conclusive evidence that Congress intended for "take" to cover a specific set of concepts that does not reach habitat modification.

In enacting the ESA, Congress was aware of the importance of protecting habitat for endangered species. To address this issue and others, Congress designed a multifaceted species protection program that places distinctly different responsibilities on federal and nonfederal actors. Under Section 7(a)(2), federal agencies must ensure that their actions will not be likely to adversely modify critical habitat.[12] 16 U.S.C. § 1536(a)(2). In contrast, Section 9, which applies to all parties in all circumstances, does not forbid the modification of habitat, critical or otherwise, but instead prohibits the "taking" of fish and wildlife species. 16 U.S.C. § 1538(a)(1). In sum, the only statutory provision that specifically addresses habitat issues relates explicitly to federal actors, while the statutory provision that reaches nonfederal parties is silent as to habitat modification.

FWS's definition of "harm" threatens to undermine this carefully considered structure. " '[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

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[12] Section 7(a)(2) may affect nonfederal actors in certain limited circumstances where those actors are federally funded or permitted, but the affirmative obligation to avoid modifying critical habitat remains assigned to the federal agency overseeing the private action.

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). If Congress had wished to regulate habitat modification activities by federal and nonfederal parties, it could easily have done so by inserting such a prohibition in the Section 9 definition of "take" or elsewhere. However, as the Court has said, "The short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979). Instead, Congress explicitly incorporated habitat modification only in the protections provided by Section 7(a)(2). It is clear, then, that Congress did not mention habitat modification in the context of regulating nonfederal activities because Congress did not intend, under Section 9 of the ESA, to enact a broad prohibition on habitat modification.

Furthermore, the FWS interpretation would render Section 5 and the critical habitat provision of Section 7(a)(2) of little moment. The federal government has scant incentive to purchase important habitats if it can achieve the same result (protection of habitat and thus species), cost free, under Section 9.[13] Moreover, there would be no need to invoke Section 7(a)(2)'s prohibition against adversely modifying critical habitat if such modification were already prohibited under Section 9. The effect is essentially to read out of the statute the only provision in which Congress specifically precluded habitat modification by endorsing an expansive interpretation of a provision that is silent as to habitat modification. Statutory terms should be interpreted so that no part of the statute will be ren-

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[13] This Court has long been concerned about agencies' attempts to achieve their goals by placing burdens on selected individuals rather than spreading the cost of achieving public goals to ensure that the public bears the burden. *See, e.g., Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.").

dered superfluous by another part of the same statute. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988). Thus, to preserve Congress' intent in enacting Sections 5 and 7(a)(2), the "harm" regulation should be invalidated.

C. Incantations of Broad Statutory Purposes Cannot Justify an Administrative Interpretation That Violates Congressional Intent.

The government claims that FWS's reading of the statute is justified because it advances a goal of the ESA—protection of endangered species' habitats. Brief for Petitioners at 17. However, appeals to the broad purposes of the Act are misplaced, for they ignore the compromises that underlie any congressional scheme:

> But no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law. Where, as here, "the language of a provision . . . is sufficiently clear in its context and not at odds with the legislative history, . . . '[there is no occasion] to examine the additional considerations of "policy" . . . that may have influenced the lawmakers in their formulation of the statute.' "

Rodriguez v. United States, 480 U.S. 522, 525-26 (1987) (per curiam) (quoting *Aaron v. SEC*, 446 U.S. 680, 695 (1980)).

Indeed, federal environmental statutes uniformly cite protection of the environment as a goal. *See, e.g.*, Clean Water Act, 33 U.S.C. § 1251(a) (1994) (goal of Act is to restore and maintain physical, chemical, and biological integrity of nation's water). However, each statute is drafted to reflect a balance between the protective goal and the societal costs associated with meeting that goal.

Thus, the Clean Water Act allows the discharge of regulated amounts of pollutants; the Resource Conservation and Recovery Act allows waste generation and disposal as long as certain waste management procedures are followed; and the Toxic Substances Control Act permits the manufacture of toxic substances as long as the amounts manufactured are recorded and reported.

When it considered how to treat habitat modification in the ESA, Congress affirmatively balanced the competing interests of protecting species' habitats and limiting the economic costs associated with such protection. While certain burdens are imposed on nonfederal parties with respect to trade in endangered species and hunting, collecting, and other forms of taking species, Congress placed the burden of habitat protection on federal parties. The government attempts to upset the balance struck by Congress in the ESA by making policy through the regulatory process and justifying it through a misleading invocation of congressional goals.

If FWS and its *amici* believe that it would be advisable to expand the scope of activities subject to regulation under Section 9, the only way to effectuate such a change is to ask Congress to amend the ESA. As the Court has stated:

> The statute may be imperfect, but the [agency] has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.

Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986). Policy changes should be reserved for congressional action, and the FWS restricted to its constitutional role: implementing the ESA as enacted by Congress.

II. BECAUSE CONSTITUTIONAL PRINCIPLES REQUIRE THAT CONGRESS DEFINE CRIMES SO AS TO PUT AFFECTED PARTIES ON NOTICE, ANY AMBIGUITY IN THE STATUTE MUST BE RESOLVED AGAINST AN FWS INTERPRETATION THAT EXPANDS CRIMINAL LIABILITY.

The ESA is clear. The statute prohibits habitat modification by federal actors but not by private or other non-federal actors. Thus, under well-settled principles of statutory construction, the Court should give effect to congressional intent and set aside the FWS regulation.

Even if the Court were to find the statute ambiguous on this point, it should nonetheless reject the FWS interpretation. The ESA is a criminal statute and the FWS regulation criminalizes ordinary conduct without providing notice to those who are subject to its prohibitions. In this circumstance, constitutional principles of separation of powers and due process dictate that any ambiguity in the definition of "take" should be resolved in a manner that limits potential criminal liability.

A. In Interpreting Ambiguous Statutory Provisions, the Weight Accorded to Agency Views Will Depend on a Number of Factors.

Ambiguous statutory provisions that are administered by an expert agency and that have civil and criminal applications raise a unique problem for reviewing courts. An agency that is delegated rulemaking authority by Congress plays an important interpretive role in certain situations. Where a particular application of a technical statutory provision has not been considered by Congress, agencies with expertise in the subject matter of the statute must interpret the provision in order to fill the gap and implement the law's civil provisions. Citing the importance of that role, the Court in *Chevron* deferred to an expert agency's reasonable interpretation of a technical statutory term that Congress had left undefined. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 866 (1984).

However, the interpretive authority of administrative agencies is subject to important constraints that have their roots in the foundation of our system of government. The constitutional separation of powers principle reflects, in large part, the determination that no single governmental body should have the power to define a crime that it also prosecutes. When a court reviews a criminal statute, it seeks to ensure that this separation is maintained. Further, due process requires that citizens be put on notice as to what constitutes criminal conduct. Thus, if a statute that imposes criminal sanctions is unclear, the statute must be interpreted narrowly to minimize the possibility that citizens can be convicted of a crime without being aware that their conduct risks criminal sanctions.

Accordingly, in reviewing an ambiguous statutory provision that has been interpreted by an administrative agency, a court must consider a number of factors to determine how to resolve the ambiguity. The court must consider whether the administration of the statute in question is delegated to a particular agency that may have developed expertise in the area and whether the issue to be resolved is one that requires the agency's expertise. However, the court must also determine whether the statute in question has criminal applications that implicate principles such as separation of powers and due process. In such circumstances, deferring to an agency interpretation would upset the balance of power among the three branches of government and, therefore, would be inappropriate.

B. The Principle of Separation of Powers Requires That Congress, Not Administative Agencies, Define Crimes.

When a court is faced with ambiguity in a statute the violation of which may cost an individual his liberty, the court's duty in interpreting the statute is clear: the court

must look to Congress, not an administrative agency, to define the scope of criminal conduct. *See United States v. Kozminski*, 487 U.S. 931, 949 (1988) (rejecting the federal government's statutory interpretation because it "would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes"). This is particularly true where the agency seeks to interpret the statute in a manner that expands the scope of criminal liability. *See id.* at 949-50.

Such is the case here. The ESA provides criminal sanctions, including imprisonment, for violations of the Act or its implementing regulations. 16 U.S.C. § 1540 (b)(1). Thus, it is a criminal statute: "we know of no other basis for determining when the essential nature of a statute is 'criminal.'" *United States v. Thompson/ Center Arms Co.*, 112 S. Ct. 2102, 2110 n.10 (1992); *see also Sweet Home Chapter of Communities for a Great Oregon v. Babbitt*, 30 F.3d 190, 194 (D.C. Cir. 1994) (Silberman, J., dissenting from denial of rehearing *en banc*). Moreover, the FWS rule has the effect of expanding the universe of activities to which these criminal sanctions apply—that is, it criminalizes activities that traditionally have been considered "takings" (*e.g.*, killing or injuring an individual member of a species) but also wholly benign activities that have never been considered "takings" (*e.g.*, removing sediment from a drainage ditch).

This fundamental principle—that the Court must interpret a criminal statute by determining the views of Congress, not an agency—rests on the separation of powers that is the foundation of our system of government. *See Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("[C]riminal statute[s are] not administered by any agency but by the courts."). "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise,

lest the same monarch or senate should enact tyrannical laws and execute them in a tyrannical maner." Baron de Montesquieu, *The Spirit of the Laws* 151-52 (Thomas Nugent trans., 1966) (1949). The Framers shared this concern, embedding the concept of separation of powers in the constitutional mandate that "[a]ll legislative powers . . . shall be vested in a Congress of the United States" and "executive power . . . in a President." U.S. Const. art. I, § 1; *id.* art. III, § 1; *see also United States v. Robel*, 389 U.S. 258, 277-78 (1967) (Brennan, J., concurring) (delegation of power to Secretary of Defense to define criminal liability "not a constitutionally acceptable substitute for Congress' judgment").

The FWS rule runs afoul of the separation of powers principle because the same agency is defining the crime and enforcing it. By interpreting Section 9 of the ESA to encompass the prohibition against habitat modification by nonfederal parties, the FWS has not merely formulated civil policy, it has defined the meaning of words in a manner that can be used to deny citizens their freedom. The defining characteristic of that interpretation is that it extends the Section 9 prohibition on "take" to a category of activities that is not explicitly mentioned in the statute and that would not be subject to the prohibition absent the FWS regulation. Adoption of the FWS interpretation would therefore result in FWS defining the scope of criminal liability. The Court should not acquiesce to FWS's usurpation of the authority that the Constitution leaves solely to Congress. Instead, the Court must determine, independent of the FWS interpretation, what Congress intended to define as a crime.

C. In the Face of Ambiguity in a Criminal Statute, the Court Must Apply the Rule of Lenity and Adopt a Narrow Interpretation.

If Congress has not clearly stated what activities are prohibited, the Court must determine some means for resolving the ambiguity without relying impermissibly on

the agency interpretation. The appropriate method for resolving ambiguity in criminal statutes derives from the guarantee of due process. Ordinary notions of due process require that citizens have notice that the conduct they are contemplating has been criminally prohibited. *Ladner v. United States*, 358 U.S. 169, 178 (1958). The courts give life to this fundamental principle by requiring Congress to be explicit about what it considers a crime. When Congress is not explicit, courts construe ambiguous provisions to limit potential criminal liability:

> [W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

Ladner, 358 U.S. at 177-78 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)); *see also Kozminski*, 487 U.S. at 952 (statute interpreted narrowly to prevent "the arbitrariness and unfairness of a legal system in which the judges would develop standards for imposing criminal punishment on a case-by-case basis"); *Thompson*, 112 S. Ct. at 2113 (Stevens, J., dissenting) (rule of lenity would be appropriate in criminal case in which the defendant did not have adequate notice of the government's interpretation of an ambiguous statute).

To ensure that individuals have adequate notice of what acts may be criminal, this Court has adopted the rule of lenity when faced with ambiguous statutory provisions. Under the rule of lenity, if the Court is "left with an ambiguous statute" after " 'seiz[ing] everything from which aid can be derived,' " the provision at issue will be read in the manner that limits criminal liability. *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805)).

This Court recently applied the rule of lenity in the civil context to reject an agency interpretation of a statute the agency had responsibility for administering. *See United States v. Thompson/Center Arms Co.*, 112 S. Ct. 2102 (1992). The controversy before the Court was predicated on a challenge to the Bureau of Alcohol, Tobacco and Firearms' ("ATF") interpretation of the word "firearms," defined in the National Firearms Act ("NFA") as rifles with barrels less than sixteen inches long, or "short-barreled rifles." ATF notified the Thompson/Center Arms Company that the product it made, an unassembled kit containing all the parts needed to make either a short- or a long-barreled rifle, was taxable as a "firearm" within the meaning of the NFA. The company sued to recover the tax it paid, arguing that its product was not taxable because assembly was required to create a short-barreled rifle and because an alternate choice by the purchaser, attaching a longer barrel, would make the product a long-barreled rifle, which is not taxable under the NFA.

The Court found that "[n]either the statute's language nor its structure provides any definitive guidance" as to whether Congress intended the term "firearm" to include an unassembled rifle. *Thompson*, 112 S. Ct. at 2107. Observing that the NFA is a strict liability statute that can result in criminal violations without a finding of willfulness, the Court applied the rule of lenity to reject the broader definition proffered by the government and concluded that a narrow construction of the term "firearm" was "proper." *Id.* at 2109.

As in *Thompson*, the FWS regulation interprets a statute to expand criminal liability in a situation where no willfulness is required to establish liability. *See* 16 U.S.C. § 1540(b). Instead, the ESA imposes criminal liability for "knowing" violations and, thus, does "not require the government to show that [the defendant] knew his conduct was illegal." *United States v. Nguyen*, 916 F.2d 1016, 1018 (5th Cir. 1990) (criminal con-

viction under Section 9 of the ESA for possession of a threatened Loggerhead sea turtle). As a result, under the FWS interpretation of "take," a citizen could be convicted of a crime if she knew that she had modified her land even if she did not know that the land was habitat or potential habitat for threatened or endangered species.[14]

Indeed, the FWS interpretation makes "knowing" but unintentional takes common occurrences. Habitats are often modified by everyday behavior, such as building a home, digging a drainage ditch, mowing a lawn, or trimming a hedge. Frequently, persons conducting these activities are individuals, not large businesses with legions of advisers.

Thus, application of the rule of lenity is necessary here because the FWS interpretation expands potential criminal liability by increasing the number of activities that are subject to the Section 9 prohibitions yet fails to notify citizens that their conduct may be criminal. *See Crandon v. United States,* 494 U.S. 152, 158 (1990); *see also Thompson,* 112 S. Ct. at 2110; *Liparota v. United States,* 471 U.S. 419, 427 (1985); *United States v. Bass,* 404 U.S. 336, 347-48 (1971); *United States v. Fisher,* 6 U.S. (2 Cranch) 358, 386 (1805). In cases such as this, where ordinary citizens have no notice that their behavior may be criminal, applying the rule of lenity is necessary to protect "the bedrock principle that in a free country citizens who

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[14] In some cases, the Court has prevented normal conduct from being criminally prosecuted pursuant to a statutory "knowing" standard by presumptively interpreting the statute to require scienter for each element of the crime. *See, e.g., United States v. X-Citement Video, Inc.,* 115 S. Ct. 464, 469 (1994) (interpreting the Protection of Children Against Exploitation Act, which prohibits "knowingly" receiving child pornography, as requiring that the defendant know that he is receiving sexually explicit material in order to prevent ordinary conduct from being criminalized). However, the same presumption has not been applied to the ESA's criminal provisions. *See Nguyen,* 916 F.2d at 1018.

are potentially subject to criminal sanctions should have clear notice of the behavior that may cause sanctions to be visited upon them." *United States v. McGoff*, 831 F.2d 1071, 1077 (D.C. Cir. 1987).[15]

In short, the FWS interpretation should be rejected under the rule of lenity.

D. FWS's Claims to Deference Must Be Rejected.

Ignoring the criminal application of the "harm" regulation, the government's brief assumes that FWS's interpretation of Section 9 is entitled to deference under *Chevron*. The gist of the government's argument is that, under *Chevron*, if the Court finds the statutory provision at issue ambiguous, then the FWS interpretation of the provision should be upheld as long as that interpretation is based on a "permissible construction" of Section 9. This argument is unavailing because *Chevron* does not apply under the circumstances of this case.

Chevron involved a challenge by several environmental groups to the Environmental Protection Agency's ("EPA") interpretation of the phrase "stationary source" in the Clean Air Act ("CAA"). Plaintiffs argued that "stationary source" was intended to refer to single emissions points and, therefore, an EPA regulation that allowed permit conditions to be based on the "bubbling" of several emissions points at a facility was impermissible under the CAA.

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[15] It makes no difference that the statute is not being challenged before this Court in the criminal context. The Court in *Thompson* applied the rule of lenity to the civil application of a statutory provision that potentially expanded criminal liability, illustrating that the mere potential that an ambiguous statutory provision will be applied to impose criminal liability requires that the provision be interpreted narrowly. Here, the Court is similarly faced with a statute that can be used to impose criminal penalties without a finding of willfulness. *See* 16 U.S.C. § 1540(b). Accordingly, it is appropriate to apply the rule of lenity even though the ESA also has civil applications.

In reviewing the challenge, the Court determined that Congress had never considered the narrow issue before the Court, but instead had left the term "stationary source" undefined and ambiguous rather than making a decision as to the proper balance to be struck between competing economic and environmental interests. *Chevron,* 467 U.S. at 862. Reasoning that when Congress leaves a technical statutory provision undefined, it must in effect be delegating the policy judgment to the agency charged with administering the statute, the Court deferred to EPA's interpretation of the statutory provision. The Court noted that EPA, unlike the Court, is part of the "political branch of Government," and it is therefore appropriate for the agency to resolve "the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities." *Id.* at 865-66. Thus, the Court determined that, as the expert in the field, EPA should be permitted to fill in the "gap left open by Congress." *Id.* at 866.

Chevron teaches that an agency's interpretation of a statute it administers may be entitled to deference, particularly when the issue before the Court has not been considered by Congress and is uniquely within the expertise of the Agency.[16] *See Chevron,* 467 U.S. at 859;

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[16] Unlike the complex, technical provision at issue in *Chevron,* the provision at issue in this case consists of words that have commonly understood meanings and, thus, require no technical expertise. The Court in *Chevron* found that the definition of "stationary source" was predicated on a complicated array of factors, only some of which were defined in the statute. *Chevron,* 467 U.S. at 864 n.38. Accordingly, the Court found that the term "stationary source" was technical and should be deciphered by EPA rather than the Court, because EPA was expert in the CAA.

Conversely, when Congress enacts a law containing words that have common meanings, it is inappropriate to conclude that Congress intended to delegate the responsibility for interpreting such words to the implementing agency. *Aurora Packing Co. v. NLRB,* 904 F.2d 73, 75 (D.C. Cir. 1990) (court declined to defer to NLRB's

Aluminum Co. v. Central Lincoln Peoples' Util. Dist., 467 U.S. 380, 389-90 (1984). However, administrative agencies have no authority to interpret criminal liability.[17] *See Kozminski*, 487 U.S. at 949. It is Congress, not administrative agencies, that must define the extent of criminal liability, and it is the role of the courts to ensure that this is the case. *Crandon*, 494 U.S. at 177 (Scalia, J., concurring). Thus, in resolving any ambiguities in the ESA, resort to administrative interpretations by FWS are inappropriate, especially where the interpretation dramatically expands the range of prohibited conduct.

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interpretation of the word "employee" because the word had an established common law meaning, and the NLRB had no expertise in common law). This Court has recognized that words of common usage and meaning are to be analyzed differently from technical words: "In the search for statutory meaning, we give nontechnical words and phrases their ordinary meaning." *Smith v. United States*, 113 S. Ct. 2050, 2061 (1993) (Scalia, J., dissenting); *see also Chapman v. United States*, 500 U.S. 453, 462 (1991); *Perrin v. United States*, 444 U.S. 37, 42 (1979). As noted above, the words "take" and "harm" have understood meanings when used in connection with endangered species. Interpreting these terms does not require technical knowledge about endangered species, but only the ability to interpret simple words in the English language. Accordingly, the statutory provision at issue here should "be read with the saving grace of common sense with which other enactments, not cast in technical language, are to be read." *Bell v. United States*, 349 U.S. 81, 83 (1955).

[17] Although the CAA has criminal provisions, the *Chevron* Court did not address the rule of lenity. A review of the briefs in *Chevron* indicates that the issue was simply not before the Court. In any event, the outcome in *Chevron* would have been the same. Unlike the FWS interpretation in this case, the EPA definition of "stationary source" did not expand potential criminal liability. Under EPA's bubble concept, several emissions points can be regulated as a single stationary source, thereby reducing the number of emissions violations that can lead to criminal liability under the CAA. Accordingly, the separation of powers and due process concerns present in this case were not of concern in *Chevron*.

In this case, acceding to FWS demands for deference under *Chevron* would have the effect of allowing an administrative agency free rein in determining what actions may result in criminal sanctions. Deference is inappropriate in such circumstances. Accordingly, if the Court finds that Congress did not have an intent with respect to the meaning of the term "take," the Court should apply the rule of lenity, resolving any ambiguity to limit potential criminal liability. Courts should not hand agencies the keys to the jailhouse door.

CONCLUSION

For the forgoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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